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Mr. Joseph Dubray
Director, Division of Policy,
Planning & Program Development
OFCCP
Room C-3325
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Washington, D.C. 20210

Sent via E-Mail

Dear Joe,

We appreciate the opportunity to review and submit comments on the OFCCP's proposed regulatory changes to Part 60-1. At the outset, we would like to commend the OFCCP for its willingness to move forward on such a long-overdue proposal. The published document clearly represents a great deal of thought and effort on the agency's part.

The following comments represent the views of Gaucher Associates, Inc., a Human Resources consulting firm specializing in employment law compliance matters, including EEO and Affirmative Action, with offices in Massachusetts and Arizona. Founded in 1994 by Attorney Richard A. Gaucher, Gaucher Associates has provided EEO/AA consulting services to, written Affirmative Action Programs for, or represented before the OFCCP, over 120 clients in the past ten years.

For the record, I should state that I was employed by the Office of Federal Contract Compliance Programs (OFCCP) for 17 years, eight as a field compliance officer, working out of the Milwaukee District Office, and the remaining nine as the Director of Operations in the OFCCP's Boston Regional Office (although one could argue that my last year was not as Operations Director, since the region had, as a practical matter, already been absorbed into the New York region).

I also served as a member of the OFCCP's Task Force on Directives and the Manual, which eliminated a number of outdated or redundant directives. I subsequently served on the team that wrote the current Federal Contract Compliance Manual (primarily chapter 3, but also some final editing of chapter 2), prepared the regulations segment of a training course for new compliance officers, and was a member of the agency's Reinventing Government committee for Administrative Issues.

I left the government in November of 1996, and joined Gaucher Associates, where I am currently Vice President. I design and prepare affirmative action programs for a substantial number of clients, as well as represent them in a wide range of circumstances before the agency.

We have already responded to the March 4, 2004 proposal by the EEOC to establish a methodology for dealing with applicants for employment whose resumes and/or applications find their way to electronic databases. We must again assert, as we did in 1999, that there is no obligation under the Uniform Guidelines on Employee Selection Procedures (UGESP) to collect any data on the race and gender of applicants for employment, however defined. The wording of the UGESP is quite clear--employers "should" collect the required data—not "must", "shall", or "will". The inclusion of a dictionary definition within the UGESP does not change that simple fact.

The introduction to the proposed regulatory change states that: "The OFCCP requires covered federal contractors to obtain, where possible, gender race and ethnicity data on applicants and employees." That's not quite the case. There is a difference in the obligations regarding race, ethnicity and gender with respect to applicants and those with respect to employees, as spelled out in the OFCCP's regulations at 41 CFR 60-1.12(c)(1). That regulation says that: "For any record the contractor maintains pursuant to this section, the contractor must be able to identify (i) the gender, race, and ethnicity of each employee, and (ii) where possible, the gender, race and ethnicity of each applicant."

As I read the regulation, contractors **must** be able to identify the race, gender, and ethnicity of all employees, but need only identify race, gender and ethnicity of applicants "where possible". Since the issue being addressed is how to handle the process of identifying the race, gender, and ethnicity of applicants, referring to requirements concerning employees in the same context could be confusing.

The introduction further compounds the possible confusion by discussing the formation of affirmative action programs and the development of a "job group analysis". Since, as the introduction states, job groups are formed by combining jobs which are similar in wage rate, content, and opportunity, we have to ask—what does job group formation have to do with applicant flow? The UGESP makes no mention of "job group", but refers only to "job", which in a conventional and ordinary sense, is taken to mean "job title". Moreover, the introduction of job groups would undoubtedly add considerable confusion for the vast majority of non-government contractors who are subject to the UGESP by virtue of their coverage as employers under Title VII, as opposed to Executive Order 11246.

While we are not arguing that the OFCCP's regulations don't require, for example, a utilization analysis showing the composition of a contractor's job groups by race, ethnicity, and gender, it's just not clear why it's mentioned here. It would almost seem as if the strength of the case regarding the obligation to identify the race, ethnicity and gender of employees is being used to buttress the case for collecting that information on applicants, a term that has yet to be defined, except at 41 CFR 60-1.3, where it is defined as "an applicant for federal assistance involving a construction contract..."
Under 41 CFR 60-2.17, Additional required elements of affirmative action programs, paragraph (b)(2) identifies "personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities". Similarly, at 60-2.17(b)(4), "selection, recruitment, **referral**, and other personnel procedures..." are to be examined "to determine whether they result in disparities..." Again, the issue here isn't whether or not covered contractors have an obligation to perform self-analyses, it's the question of how an applicant is to be defined, which is the starting point for any alleged obligation to begin a process for soliciting data on race, ethnicity, and gender.

Similarly, the discussion of how the OFCCP selects contractors for audit seems to bear no relationship to the matter at hand, namely - how to define "applicant". The discussion is based on the clear and, insofar as we know, unobjectionable obligation of covered contractors to collect and maintain data on the race, gender, and ethnicity of employees. The fact that the OFCCP's EO Survey "requires" submission of information on the race, gender and ethnicity of applicants still does not provide any information on how an applicant is to be defined for such purposes. The EO Survey only reiterates the "concept" of applicant as contained in the 1979 Questions and Answers to the UGESP.

The same is true with respect to the mention of the OFCCP's scheduling letter. Requesting information on applicant flow by race, gender and ethnicity is not the same as defining who is an applicant for purposes of data collection.

It is interesting to note that the OFCCP claims on page 16447, column one, that "...OFCCP regulations did not expressly require contractors to maintain and submit to OFCCP information about the gender, race and ethnicity of applicants and employees prior to the November 13, 2000 amendments. " The OFCCP has contended for a number of years that the UGESP, embodied in its regulations at 41 CFR Chapter 60 Part 3, were required of all covered contractors.

The pre-2000 regulations also required that contractors provide to the OFCCP, upon request, not only copies of their affirmative action programs, but the "support data" as well. 41 CFR 60-2.12(m), Establishment of goals and timetables stated that "support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to...applicant flow data and applicant rejection ratios indicating minority and sex status.

While the introduction notes that the EEOC has published a Notice in the Federal Register seeking comments on its proposal for a definition under the UGESP for an "internet applicant", it then goes on to suggest that this constitutes "recent interpretive guidance". Since it's only a proposal, perhaps the OFCCP should have waited for the final version before moving ahead on its own proposal.

The EEOC's proposal was for a three-part definition of "internet applicant". In the analysis section, and in the proposed regulation, the OFCCP sets out a four-part definition. The OFCCP's proposal also makes clear the fact that what is being proposed is a "minimum qualifications" standard.

The four parts are as follows:

(1) a job seeker has submitted an expression of interest through the internet or related electronic technologies;
(2) the employer "considers" the job seeker for employment for a particular open position;
(3) the "expression of interest" demonstrates that the job seeker " possesses the "advertised, basic qualifications for the position" (read: minimum qualifications); and
(4) there is no indication that the job seeker is no longer interested in the position

Item one is somewhat vague. We can understand a job seeker who may file a resume with an online service, such as America's Job Bank. What is less clear, is what is meant by the phrase "related electronic technologies." Many contractors, either directly or through subcontract, scan resumes into an electronic database. The OFCCP's distinction between internet/electronic and more "traditional" applicants (surface mail, walk-in) begins to blur when all applications are placed in a central database. On many occasions, Deputy Assistant Secretary for Federal Contract Compliance Programs Charles James has stated that it was the OFCCP's intent to establish one definition for all applicants, whether applications were submitted electronically, or through more traditional means. Given the difficulty of maintaining a two-track system (which the OFCCP acknowledges), this proposal is a definite incentive for every contractor to routinely import all resumes into an electronic database.

Item two is one that also appears in the EEOC's proposal. In our comments, we pointed out that there are situations in which a contractor may use a "search screen" on a database, come up with an unworkable number of "hits", and continue to refine the search criteria until it generates a reasonable number of responses. In our view, only the last set of criteria would be the ones defining a selection. We await the EEOC's response on this point.

Item three is the one that we have the most difficulty with. In our view, there is no question but that "advertised, basic qualifications" refers to minimum qualifications, and would be so interpreted by covered federal contractors everywhere. The OFCCP is well aware that on its face, such a proposal (leaving aside any other issues) would be considered contrary to the UGESP. Hence the extensive discussion around Griggs v. Duke Power and other cases that led to the establishment of the UGESP in the first place, and how the principles established therein are not violated by this proposal.
In 1992 then-Director Jaime Ramon and Deputy Director Len Biermann put their heads together over a compliance evaluation of a company called Roche Diagnostic Systems, Inc. The outcome was a "Letter of Commitment" signed July 28, 1992, in which Roche agreed to "implement an application system" to be implemented no later than September 1, 1992, containing two elements, as follows:

a. The acceptance of applications only for open positions;
b. Only individuals who possess minimum qualifications for the open position and who fill out application forms with the appropriate "tear off" self identification form...will be considered "applicants" for the purposes of the company's annual adverse impact analysis.

A copy of this Letter of Commitment was distributed to all OFCCP Regional and District Offices, with a cover memorandum dated August 17, 1992, and signed by Len Biermann. In that memorandum, Mr. Biermann stated "Please advise your managers and compliance officers that this agreement constitutes a determination of the Director that, provided the commitments are carried out, the company is in compliance with regulatory requirements concerning the processing of applications and annual adverse impact analyses."

Hedging his bets, Mr. Biermann's memo also said, in the final paragraph, "should you believe, as a result of compliance reviews, that this system does not adequately meet regulatory requirements, you should address your concerns, with full supporting documentation, to myself or the Director."

Without waiting for compliance review experience or much in the way of "supporting documentation", most if not all of the OFCCP's Regional Directors weighed in on the issue immediately, as did the Associate Solicitor of Labor for Civil Rights, Jim Henry. To the best of my knowledge, all of the comments were negative.

Mr. Henry provided the Director with a legal opinion in which he clearly stated that use of a "minimum qualification standards" screen to mark the stage at which an attempt to collect race and gender information would be made would be a clear violation of the UGESP.

He put it this way:

> "We are deeply troubled by this Letter of Commitment because we believe it will severely undermine the OFCCP's ability to discover discrimination. First, the system will eliminate OFCCP's ability to detect almost all disparate impact violations, because the company will not have any data on people who are screened out by what it labels its 'minimum qualifications.' Because such people are not considered 'applicants,' OFCCP will not know the numbers of people, by race and sex, who are adversely affected by a particular qualification requirement. Thus, for example, a company could require a Ph.D. for a particular position; however, if that requirement screens out a disproportionate number of minorities or women, OFCCP will be unable to discover that fact during a compliance review, because the contractor will maintain data only for people who actually possess such a degree...passing an interview with a particular score could be considered a 'minimum' qualification requirement, and OFCCP will not know whether the interviews were conducted fairly."

Mr. Henry's memo also noted that former OFCCP Director Joe Cooper sent a letter to the OFCCP concerning the definition of an applicant for employment and a contractor's obligation to maintain applicant flow data. In his letter, Cooper described an employment process in which individuals who met minimum qualifications (as indicated on their resumes) would be sent an employment application along with a voluntary form for information on race and sex. Applicant flow data would then be compiled on those individuals submitting applications.

The OFCCP responded to Mr. Cooper's letter, pointing out that "the proposed practice would violate 41 CFR Part 60-3, because the initial assessment of who met the minimum qualifications was a selection procedure that must be reflected in an impact analysis": The OFCCP response also "suggested that the contractor list the basic qualifications in its job postings and advertisements to that applicants would self select", but at no time did it suggest that basic principle, that minimum qualifications are in themselves a selection device, and thus subject to testing for adverse impact, did not apply.

This proposal seeks to disarm Mr. Henry's argument against a minimum qualifications standard by seizing on the last point, that if the qualifications are published, then there is a self-selection process going on, and anyone who is deterred from applying is of no consequence. But there remains the problem of testing for the impact that those qualifications might have. Including in the regulation a statement that "the qualifications must be job-related; in other words, they are relevant to performance of the job at hand and enable the employer to accomplish business-related goals" is just what the Court

concluded in the Griggs vs. Duke Power case. Simply asserting the proposition doesn't make it so. If it did, we could dispense with the UGESP entirely.

Finally, item four posits that there will be a process by which an employer will determine that a job seeker remains interested in the position. Whether such a method would be active or passive (i.e., failing to respond to a direct inquiry of continued interest vs. failing to follow directions for moving to a second stage in the application process) is not spelled out. The EEOC's proposal includes a similar provision. Even before the Internet, the UGESP included provisions for excluding from adverse impact analysis those individuals who withdrew "at any stage" from the application process. And, as with the current UGESP, "users", as they are referred to, are required to maintain information on those individuals.

For a number of years, when Len Biermann was Deputy Director of the OFCCP, he would advise contractor groups that they should retain copies of the applications of all people who were washed out of the selection process, for whatever reason. The idea was that if the OFCCP conducted a compliance evaluation, and was not satisfied with the stage at which information on race, gender, or ethnicity was solicited, they could sample the "database" of rejected resumes/applications, request race, gender and ethnicity data, and calculate their own selection rates. That would continue to be the case under this proposal, but then, it's already the case under the provisions of the current regulations as well. A number of our clients have been erroneously cited by the OFCCP for "failure to maintain records", in situations where the records (i.e., applications/resumes) were available, but race, ethnicity and gender information was not. The OFCCP's compliance officers simply refused to conduct the necessary analyses.

Having that information available would at least be an improvement over the OFCCP's suggestion that it will resolve the issue of minimum/basic qualifications by utilizing "labor force statistics", whatever those might be. Mention is made of various strategies used in the past to substitute for missing data, such as the use of population statistics or occupational statistics from the census. As the proposal puts it:

> "The OFCCP will compare the proportion of women and minorities in the contractor's relevant applicant pool with labor force statistics or other data on the percentage of women and minorities in the relevant labor force. If there is a significant difference between these figures, OFCCP will investigate further as to whether the contractor's recruitment and hiring practices conform with E.O. 11246 standards"

Reference is then made to the use of "labor force statistics" to develop an "availability analysis", which is defined as an "estimate" of the number of qualified minorities or women available for employment in a given job group." "Estimate" is the operative word here. Population statistics, for example, include people who are under sixteen as well as those beyond the reach of the ADEA. Census data is similarly lacking in probative value. A contractor seeking to hire legal secretaries would be hard pressed to find census data on secretaries that was strictly limited to people with the requisite skills. The 2000 Census expands on the number of categories for computer-related occupations, but reduces the number of post-secondary education fields from thirty discipline-specific categories to only one. Physics professors and romance language professors are in the same category now, along with social scientists, historians, and everyone else.

Consider the purpose of the UGESP, to help determine whether or not an employer's selection criteria, uniformly applied, have an inadvertent, negative impact on employment on the basis of race, gender or ethnicity. When adverse impact in selection is identified, employers have three options. One is to stop using the criteria. Unfortunately, doing so might subject an employer to litigation for discrimination against all of the individuals "unfairly" screened out while the criteria were in use.

The second alternative is to conduct an expensive and time-consuming validation study. If an employer hired ten people to a job in one year, consisting of 1 female and 9 males, out of an applicant pool consisting of 100 persons, including 20 females and 80 males, the adverse impact analysis result would yield a selection ratio for women that was less than 80% of the male ratio. Fisher's Exact Test for small sample sizes would apply, rendering the result as not statistically significant and, as such, not "really" adverse. But suppose we take the same selection numbers, and load not the known respondents to a voluntary self-identification form, but some larger number, such as census data, for example Statisticians from the 1990 Census for the United States). There were 31,852 persons reported in this standard occupational classification, 15,744 males and 16,108 females. Plugging these numbers into the equation gives a statistically significant result. Would the employer then be required by the OFCCP to demonstrate the validity of its selection criteria? Remember, there were only ten employment selections in a year. In the "real world" we would not expect that the OFCCP would make such a demand. But it could, under this proposal.

The analysis section also makes reference to availability estimates, although it is difficult to see how availability estimates are relevant. Availability estimates are a combination of the calculation of a weighted composite of census data for several standard occupational classification codes, and internal availability. Hiring statistics, which may be accumulated into job groups for convenience, are the result of different hiring decisions made on the basis of qualifications that differ by job title, and may even differ by time period for the same job title. We can't believe that the OFCCP is proposing to compare availability estimates to applicant percentages, although from this proposal such a conclusion would not appear to be too far-fetched. However, none of the circumstances involved in the hiring process would be accounted for in a proposal to use availability estimates or other "labor force statistics" measures as a substitute for applicant flow data based on the voluntary response of individual "job seekers" to an inquiry regarding race and gender.

We have had situations in which employers had almost the same number of total applicants as total hires, and for particular job groups and job titles, sometimes fewer applicants than hires. This happens because under the UGESP, adverse impact is calculated based on the number of persons of "identifiable" race, gender and ethnicity. If applicants don't complete and return self-identification forms, if they fill out race, gender and ethnicity information but fail to include a recognizable job title, if they complete gender but not race or ethnicity, and vice versa, then under the UGESP they are excluded from the calculation of adverse impact.

The third alternative under the UGESP when there is apparent adverse impact is to use selection criteria that either do not have an adverse impact, or have less of an impact (with the same potential obligation to validate the selection criteria, and the same potential

liability for the effects of any discarded selection criteria, the worst of both worlds, as it were).

Apart from the questions of whether or not this proposal is, in fact, consistent with the UGESP and its legal underpinnings, as well as whether and how its provisions might be overly vague and subject to differing interpretations, there is the question of the additional recordkeeping burden that it places on contractors.

In our comments on the EEOC's proposed additions to the Questions & Answers to the UGESP, which also included a proposal to use some sort of labor force statistics (if memory serves me correctly, they made direct reference to census data), we offered as a "modest proposal", a way to ameliorate the consequences of permitting a minimum qualifications standard to define an internet applicant. We suggested that perhaps contractors should simply stop collecting applicant data and just use census data. An employer would seem to be no less likely to get the same number of adverse impact "false positives" using labor force statistics alone than it would using those statistics in conjunction with a subset of applicant race, gender and ethnicity data from job seekers meeting "minimum qualifications."

We believe that the OFCCP's current proposal, with its dual-track system for traditional applicants, would make an already complex system even more Byzantine. As we noted above, at the very least it provides an incentive for contractors to require electronic submissions only or to scan all resumes and applications, whether received initially in an electronic format or not, into an electronic database, just to avoid a two-track system.

We would like to suggest an alternative, which we believe would relieve contractors of much of the burden of both data collection **and** data retention. Assuming for the moment that employers actually are **required** to "maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B of this section in order to determine compliance with [the] guidelines", why not adopt the approach of the remainder of that section of the UGESP, and "where there are large numbers of applicants and procedures are administered frequently" permit them to retain "such information...on a sample basis"? (41 CFR 60-3.4A).

Permitting contractors to use sampling to manage large numbers of applicants, regardless of whether they arrive through the Internet or other electronic sources, such as in-house resume databases, or hand-delivery or surface mail, would eliminate the need for employers to have to calculate selection rates separately for two sets of applicants. If sampling were to encompass the two most basic defining requirements of an applicant (interest in employment with a specific employer, and the existence of an "open" job at that employer), there would be no need to run the risk of violating the underlying principles of the UGESP by using "minimum qualifications." There would also be no need for the OFCCP to compare applicant flow to availability estimates or to other equally imprecise or irrelevant measures, such as "labor force statistics", to determine whether or not the use of "minimum qualifications" is screening out a disproportionate number of people by race, gender or ethnicity, as appears to be the case under this proposal. This could, we believe, dramatically reduce the burden of data collection and recordkeeping on contractors.

We thank you for the opportunity to comment on these regulations, and look forward with interest to the agency's response. We know that we will have an opportunity to review and comment again, before they go to the Office of Management and Budget for their review.

Sincerely,

Stan Koper
Vice President
Gaucher Associates

cc: Richard A Gaucher